KERAJAAN NEGERI JOHOR & ANOR

v.

ADONG KUWAU & ORS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
ABU MANSOR ALI JCA
[CIVIL APPEAL NO: J-01-65-97]
24 FEBRUARY 1998

CONSTITUTIONAL LAW: *Right to property - Right to livelihood - Compulsory acquisition - Compensation - Aboriginal Peoples Act 1954 - Whether Act removes common law rights - Distinction between "aboriginal area" and "aboriginal inhabited place" - Aboriginal Peoples Act 1954, s. 2 - Federal Constitution, art. 13*

CIVIL PROCEDURE: *Costs - Deprivation of costs - Whether and when may successful party be deprived of costs - Discretion of trial judge - Whether properly exercised - Whether judge must give reasons for deprivation of costs*

CIVIL PROCEDURE: *Interest - Deprivation of interest - Whether court may refuse interest - Whether must state reasons for refusal - Whether trial judge exercised discretion properly*

This was an appeal against the decision of the High Court which held that the respondents (plaintiffs in the court below) being the aboriginal people of this country were seised of common law rights over land and were entitled, by reason of art. 13(1) of the Federal Constitution, to receive fair and reasonable compensation when such rights were deprived by state action.

The appellants contended that the respondents' rights and the manner of their enforcement were exclusively governed by the Aboriginal Peoples Act 1954 ('the Act') and hence there was no room for the co-existence of common law rights.

Held:
Per Gopal Sri Ram JCA

[1] It is settled beyond argument that in our jurisdiction, the deprivation of livelihood may amount to the deprivation of life itself, and that state action which produces such a consequence may be impugned on well established grounds. Where state action has the effect of unfairly depriving a citizen of his livelihood, adequate compensation is one method of remedying the

harm occasioned by such action pursuant to art. 13 of the Federal Constitution.

[2] The Act does not exclude the rights vested in the aboriginal people at common law.

[3] Section 2 of the Act creates a distinction between an "aboriginal area" and an "aboriginal inhabited place". The appellants had relied on ss. 5 & 6 of the Act which were concerned with an "aboriginal area" whereas the respondents' case was reliant upon the absence of anything in the Act that excluded their common law rights to derive their livelihood from land which was an "aboriginal inhabited place".

[4] The general rule is that a successful litigant is entitled to his costs. Departure from the general rule is only permissible when it is demonstrated that the successful litigant has misconducted himself in such a fashion and to such a degree in the conduct of the proceedings that he ought not to have his costs despite his success. A court may also make no order as to costs where the successful party says that he is not seriously asking for an order of costs in his favour.

[5] It is elementary law that costs and interest are matters within the discretion of the trial judge and that the Court of Appeal will not lightly interfere with the exercise of such discretion. However, in the present case, the learned judge made no order as to costs and gave no reasons for depriving the respondents of their costs. There was no suggestion at the trial or in the judgment that the respondents had misconducted themselves to be deprived of costs. The learned judge, therefore, did not appear to have sufficiently addressed his mind to those matters of relevance that guide a court's discretion when making an order as to costs. Hence, there was no proper exercise of discretion on the question of costs.

[6] It is well recognised that the purpose of an award of interest is to compensate a plaintiff who has been kept out of money that is lawfully due to him. However, a court of justice is entitled to deprive a successful party of interest on a monetary claim but it must clearly state its reasons for doing so.

[7] In the present case, there was no indication anywhere in the learned judge's judgment that he had refused an award of interest in the exercise of his discretion. In fact, there was no exercise of discretion at all on the question of interest. This was a proper case where the Court of Appeal was entitled to exercise a discretion of its own.

[Appeal dismissed; costs of proceedings in High Court to respondents.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Ini merupakan rayuan terhadap keputusan Mahkamah Tinggi yang telah memutuskan bahawa responden-responden (plaintif-plaintif dalam mahkamah di bawah) yang merupakan orang asli negeri ini yang telah dirampas hak common law ke atas tanah dan berhak, kerana art. 13(1) Perlembagaan Persekutuan, untuk menerima pampasan yang adil dan wajar sedangkan hak yang sedemikian telah dilucuthak oleh tindakan negeri.

Perayu menegaskan bahawa hak responden-responden dan cara penguatkuasaan mereka adalah dikuasai secara eksklusifnya oleh Akta Orang-Orang Asli 1954 dan dengan itu tidak terdapat ruang bagi kewujudan bersama hak common law.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Adalah ditetapkan di luar bidang penghujahan bahawa menurut bidangkuasa kami kelucutan hak sara hidup mungkin membawa kepada perlucutan hak kehidupan itu sendiri dan tindakan negeri itu yang menghasilkan akibat yang sedemikian boleh dicabar atas alasan-alasan yang kukuh. Di mana tindakan negeri mempunyai kesan melucut hak seseorang warganegara akan kehidupannya dengan secara tidak adil, pampasan yang memadai merupakan satu cara memperbaiki kesusahan yang disebabkan oleh tindakan yang sedemikian selaras dengan art. 13 Perlembagaan Persekutuan.

[2] Akta Orang-Orang Asli 1954 ('Akta tersebut') tidak mengenepikan hak yang diletakhak kepada orang-orang asli di peringkat common law.

[3] Seksyen 2 Akta tersebut mewujudkan satu perbezaan antara suatu "kawasan orang asli" dan suatu "tempat tinggal orang asli" perayu telah bergantung pada ss. 5 & 8 Akta tersebut yang mana berhubung dengan "kawasan orang asli" sedangkan kes responden bergantung ke atas ketiadaan apa-apa pun dalam Akta tersebut yang mengenepikan hak common law mereka untuk mendapat sara hidup mereka daripada tanah yang mana merupakan suatu "tempat tinggal orang asli."

[4] Kaedah umum adalah bahawa litigan yang berjaya adalah berhak kepada kosnya. Menyimpang daripada kaedah umum ini hanya dibenarkan apabila ditunjukkan bahawa litigan yang berjaya itu telah salah laku dirinya sendiri dengan cara dan sehingga kepada suatu had dalam melaksanakan prosiding tersebut hinggaikan beliau tidak seharusnya mendapat kosnya walaupun beliau berjaya. Sesebuah mahkamah juga tidak perlu membuat perintah bagi kos di mana pihak yang berjaya itu menyatakan bahawa beliau tidak memohon secara seriusnya untuk mendapatkan satu perintah kos yang memihak kepada dirinya.

[5] Ianya merupakan undang-undang permulaan bahawa kos dan faedah adalah perkara-perkara yang berada dalam lingkungan budibicara hakim perbicaraan dan bahawa Mahkamah Rayuan tidak akan mencampuri secara mudahnya dengan perlaksanaan budibicara yang sedemikian. Walaubagaimana pun, dalam kes semasa ini, hakim yang bijaksana tidak membuat perintah bagi kos dan tidak memberikan alasan kerana melucuthak responden-responden dari kos mereka. Tidak terdapat apa-apa saranan di perbicaraan atau dalam penghakiman bahawa responden-responden telah tersalah laku akan dirinya hinggakan dilucut hak akan kos. Hakim yang bijaksana dengan itu, nampaknya tidak memikirkan dengan sewajarnya perkara-perkara relevan yang membimbing budibicara mahkamah ketika membuat sesuatu perintah berhubung dengan kos. Dengan itu, tidak terdapat sebarang perlaksanaan budibicara yang wajar ke atas persoalan kos.

[6] Adalah diiktirafkan bahawa tujuan sesuatu award faedah adalah untuk memberikan pampasan kepada seseorang plaintif yang telah tidak diberikan wang yang secara sah di sisi seharusnya diberikan kepadanya. Walaubagaimana pun sesebuah mahkamah keadilan adalah berhak untuk melucuthak pihak yang berjaya mendapatkan faedah ke atas tuntutan wang tetapi ianya mestilah menyatakan dengan jelasnya alasan-alasannya kerana berbuat sedemikian.

[7] Dalam kes semasa, tidak terdapat apa-apa petunjuk di mana-mana dalam penghakiman hakim yang bijaksana bahawa beliau telah menolak award faedah dalam melaksanakan budibicaranya. Malahan tidak terdapat perlaksanaan budibicara sama sekali ke atas persoalan faedah. Ini merupakan suatu kes yang wajar di mana mahkamah rayuan berhak untuk melaksanakan budibicaranya yang tersendiri.

[Rayuan ditolak.]

Cases referred to:

Adong Kuwau & Ors v. Kerajaan Negeri Johor [1997] 1 MLJ 418 ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan [1997] 1 CLJ 665 ***(cit)***

R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(cit)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 ***(cit)***

Legislation referred to:

Aboriginal Peoples Act 1954, ss. 2, 5, 6

Federal Constitution, art. 13(1)

For the appellants - Dato' Zainal Adzam Abdul Ghani SLA (Teo Say Eng SFC with him); State Legal Adviser's Office, Johor
For the respondents -R Rajasingam (S Kanawagi with him); M/s Khana & Co

[Appeal from High Court, Johor Bahru; Originating Summons No: 24-828-94]

Reported by Ling Hea Hoon

JUDGMENT

Gopal Sri Ram JCA:

The judgment against which this appeal has been preferred is reported in the law reports. See *Adong bin Kuwau & Ors v. Kerajaan Negeri Johor* [1997] 1 MLJ 418. In it the learned trial judge has admirably dealt with the factual background, the issues before him and the applicable law. We therefore find it unnecessary to go into these in any detail.

In a gist, the learned judge held that the respondents (plaintiffs in the court below) being the aboriginal people of this country are seised of common law rights over land and are entitled, by reason of art. 13(1) of the Federal Constitution, to receive fair and reasonable compensation when such rights are deprived by state action. Dato' Zainal Adzam, the learned State Legal Adviser who appeared in support of the appeal (but not in the court below) informed us that the appellants did not quarrel with this proposition. His complaint is that the learned judge was wrong in holding that there existed any such rights as aforesaid. According to the learned State Legal Adviser, the respondents' rights and the manner of their enforcement are exclusively governed by the Aboriginal Peoples Act 1954 (the Act). Consequently, there is no room for the co-existence of common law rights. Before we express our views upon the correctness of the submissions made in support of the appeal it is important that we hearken to certain passages in the judgment of the learned judge which were drawn to our attention by the learned State Legal Adviser and which form the subject matter of the appellants' complaint.

The first of these passages appears at p. 50 of the Appeal Record and reads:

> "My view is that, and I get support from the decision of *Calder's* case *(Calder v. Attorney-General of British Columbia* [1973] 34 DLR (3d) 145) and *Mabo's* case *(Mabo & Ors v. State of Queensland* [1986] 64 ALR 1), the aboriginal peoples' rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial. I believe this is a common

law right which the natives have and which the Canadian and Australian courts have described as native titles and particularly the judgment of Judson J in the *Calder* case at p. 156 where His Lordship said the rights and which rights include ... 'the right to live on their land as their forefathers had lived and that right has not been lawfully extinguished ... ' I would agree with this ratio and rule that in Malaysia the aborigines common law rights include, *inter alia*, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers.

The next passage is at pp. 52-3 of the Appeal Record. In it the judge said:

These people live from the hunting of animals in the jungle and the collection of jungle produce. These are the only source of their livelihood and income. Can these rights be taken away by the government without compensation? At a glance this could be done, but upon looking further and deeper, it is my opinion that compensation ought to be made. This can be discerned from s. 11 of the Act, which guarantees adequate compensation for land, bearing rubber or fruit trees claimed by the aboriginal people, that is alienated. It is clear to me that the land on which those trees are planted is either a reserve land for the aboriginal people or an area where they had a right to access, which is a jungle reserve. In the first case, there is no problem because it is their reserved land. In the second case, it is clear that the land belongs to the state but they were planted by the aborigines. As such, adequate compensation must be made for these trees but not for the land. In the present case, I am of the view that adequate compensation for the loss of livelihood and hunting ground ought to be made when the land where the plaintiffs normally went to look for food and produce was acquired by the government. The compensation is not for the land but for what is above the land over which the plaintiffs have a right.

The 1974 Act does not limit the aborigines rights therein. In order to determine the extent of aboriginal peoples full rights under law, their rights under common law and statute has to be looked at conjunctively, for both these rights are complementary, and the Act does not extinguish the rights enjoyed by the aboriginal people under common law.

The third passage, which is at p. 59 of the Appeal Record, reads:

I will now proceed to examine whether the plaintiffs were deprived of proprietary rights protected by the Federal Constitution art. 13(1).

At the time the defendants entered into an agreement with the Government of the Republic of Singapore and built a dam in the Linggiu Valley, the plaintiffs rights of free access into Linggiu valley and to harvest the fruits of the jungle were unchallenged and recognised in law. It is the building of the dam that

brought the plaintiffs freedom of movement within the Linggiu valley, which is guaranteed by the Federal Constitution art. 9(2), to an end and subsequently extinguished the plaintiffs' rights to collect the forest produce which are recognised at common law and statutory law.

The plaintiff's statement that the forest was a source of their livelihood was not rebutted by the defendants and neither was there evidence that there was a break in the continuous occupation and traditional connection in the land for their livelihoods.

It has been long recognised under our law that when a person is deprived of any proprietary right under an executive exercise pursuant to powers given by statute, that person must be compensated.

The final passage is at p. 65 of the Record of Appeal. It reads:

For a case involving the plaintiffs, I would state that the plaintiffs had suffered deprivation of the following types of interest in the land:

(1) deprivation of heritage land;

(2) deprivation of freedom of inhabitation or movement under Art. 9(2);

(3) deprivation of produce of the forest;

(4) deprivation of future living for himself and his immediate family; and

(5) deprivation of future living for his descendants.

We can find nothing objectionable in the foregoing passages. Indeed, we entirely agree with the views expressed by the learned judge in his judgment upon the issue of liability. Those views accord with the jurisprudence established by our courts and by the decisions of the courts of other jurisdictions which deserve much respect. It is now settled beyond argument in our jurisdiction that deprivation of livelihood may amount to deprivation of life itself and that state action which produces such a consequence may be impugned on well established grounds. See *Rama Chandran v. Industrial Court* [1997] 1 AMR 433; *Tan Teck Seng v. Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 269; *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan* [1996] 1 MLJ 481. The learned judge was therefore correct in concluding that where state action has the effect of unfairly depriving a citizen of his livelihood, adequate compensation is one method of remedying the harm occasioned by such action pursuant to art. 13 of the Federal Constitution.

We are therefore unable to agree with the submissions of the learned State Legal Adviser and his criticism of the learned judges judgment. A reading of the Act makes it plain that it does not exclude the rights vested in the respondents at common law. As pointed out by the learned judge, and by

counsel for the respondents during argument before us, the Act in s. 2 creates a distinction between an aboriginal area and an aboriginal inhabited place. These are defined as follows:

> 'aboriginal area' means an aboriginal area declared to be such under this Act.
>
> 'aboriginal inhabited place' means any place inhabited by an aboriginal community which has not been declared to be an aboriginal area or aboriginal reserve.

Sections 5 and 6 of the Act which were relied upon by the appellants are concerned with an aboriginal area. However, the respondents case is not based upon a claim that the land in question was an aboriginal area. They rely upon the absence of anything in the Act that excludes their common law rights to derive their livelihood from land which is an "aboriginal inhabited place". Herein lies the fallacy in the appellants' argument.

The learned State Legal Adviser also complained of the quantum awarded by the learned judge. However, a perusal of the Appeal Record reveals that the basis of compensation adopted by the learned judge is fair and reasonable having regard to the submission made by counsel who appeared for the appellants in the court below. Indeed, it appears that the learned judge's award is well below the figure suggested by the appellants at the hearing before the High Court.

That brings us to the respondents cross appeal which is directed against the learned judge's failure to order costs and interest. It is elementary law that costs and interest are matters within the discretion of a trial judge and that this court will not lightly interfere with the exercise of such discretion.

In the present instance, the learned judge made no order as to costs. However, he gave no reasons for depriving the respondents of their costs. There was no suggestion at the trial or in the judgment that the respondents had misconducted themselves to be deprived of costs. The general rule is that a successful litigant is entitled to his costs. Departure from the general rule is only permissible when it is demonstrated that the successful litigant had misconducted himself in such a fashion and to such a degree in the conduct of the proceedings that he ought not to have his costs despite his success. A court may also make no order as to costs where the successful party says that he is not seriously asking for an order of costs in his favour. In this case it does not appear that the learned judge sufficiently addressed his mind to those matters of relevance that guide a courts discretion when making an order as to costs. In our judgment, there was no proper exercise of discretion on the question of costs. We therefore set aside his order on costs and substituted

in its place that the respondents shall have the costs of the proceedings before the High Court. However, counsel for the respondent informed us that he was not pressing for costs of the appeal, and for that reason we made no order as to costs of the proceedings before us.

Turning now to the issue of interest, it is now well recognised that the purpose of an award of interest is to compensate a plaintiff who has been kept out of money that was lawfully due to him. Of course, a court of justice is entitled to deprive a successful party of interest on a monetary claim. But it must clearly state its reasons for doing so. In the present instance there is no indication anywhere in the learned judge's judgment that he had refused an award of interest in the exercise of his discretion. Indeed there was no exercise of discretion at all on the question of interest. Consequently, this is a proper case where this court is entitled to exercise a discretion of its own. It is clear from the finding of the learned judge, with which we have expressed our unqualified agreement, that the respondents were entitled to be compensated for the deprivation of their livelihood. They ought to have been paid the compensation so soon as the wrong was done them. Taking into account all relevant circumstances of the case, and in the exercise of our discretion, we ordered the appellants to pay interest at the rate of 8% per annum upon the sum awarded by the judge from the date of the respondents originating summons, that is to say, from 4 November 1994 until the date of payment.

For the reasons given, the appeal was dismissed. The finding of the judge on liability and quantum was affirmed. The cross appeal was allowed. We made no order as to the costs of the appeal and the cross appeal.